

Update: Michigan Circuit Court Benchbook

CHAPTER 1

General Rules Governing Court Proceedings

1.1 Access to Court Proceedings and Records

F. Limits on Access to Court Records—MCR 8.119(F)

Delete the November 2005 update to page 5. In an order dated March 29, 2006, the Supreme Court reversed the Court of Appeals and remanded the case to that Court for further proceedings. *UAW v Dorsey*, 474 Mich 1097 (2006).

CHAPTER 2

Evidence

Part II—Relevancy (MRE Article IV)

2.14 Similar Acts Evidence

A. Rule

Effective March 24, 2006, 2006 PA 78 enacted a statute authorizing the admission of evidence regarding a defendant's other acts of domestic violence. Insert the following text immediately after the January 2006 update to page 51:

Evidence that a defendant committed other acts of domestic violence is admissible in a criminal action against a defendant accused of committing an offense involving domestic violence. MCL 768.27b.* If admissible, such evidence may be introduced “for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.” MCL 768.27b(1). The statutory provisions of MCL 768.27b “do[] not limit or preclude the admission or consideration of evidence under any other statute, rule of evidence, or case law.” MCL 768.27b(3).

MCL 768.27b contains a temporal requirement. “Evidence of an act occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that admitting this evidence is in the interest of justice.” MCL 768.27b(4).

MCL 768.27b(5) defines the term “domestic violence” for purposes of this statute as “an occurrence of 1 or more of the following acts by a person that is not an act of self-defense:

- (i) Causing or attempting to cause physical or mental harm to a family or household member.*
- (ii) Placing a family or household member in fear of physical or mental harm.
- (iii) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.
- (iv) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.” MCL 768.27b(5)(a).

*Applicable to trials and evidentiary hearings started or in progress on or after May 1, 2006.

*“Family or household member” is defined in MCL 768.27b(5)(b).

CHAPTER 2

Evidence

Part II—Relevancy (MRE Article IV)

2.14 Similar Acts Evidence

E. Notice Requirement

Effective March 24, 2006, 2006 PA 78 enacted a statute authorizing the admission of evidence regarding a defendant's other acts of domestic violence. Insert the following text after the January 2006 update to page 54:

MCL 768.27b, which governs the admissibility in criminal cases of evidence of other acts of domestic violence committed by a defendant, contains a notice requirement. MCL 768.27b(2) requires the prosecuting attorney to disclose evidence admissible under this statute, "including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown."

CHAPTER 2

Evidence

Part III—Witnesses, Opinions, and Expert Testimony (MRE Articles VI and VII)

2.35 Medical Malpractice—Expert Testimony

B. Standard of Care

Insert the following two case summaries after the February 2006 update to page 97:

In *Robins v Garg*, ___ Mich App ___ (2006), the Court of Appeals reversed the grant of summary disposition in favor of defendant. The trial court had granted summary disposition based on a finding that plaintiff's standard of care expert was unqualified to testify. In support of his medical malpractice action against a general practitioner, plaintiff had submitted an affidavit of merit by a family practitioner. The Court noted that "[t]he practice of a family practitioner and a general practitioner are alike in that neither practice is limited to a specific branch of medicine." The Court further noted that "[t]he terms family practitioner and general practitioner have become interchangeable." Accordingly, the Court held that "[f]or purposes of satisfying the requirements of MCL 600.2169, . . . a family practitioner and a general practitioner are physicians engaged in the same type of medical practice."

In *Brown v Hayes*, ___ Mich App ___ (2006), the Court of Appeals criticized the Court's prior holding in *McElhaney v Harper-Hutzel Hosp*, 269 Mich App 488, 496 (2006), which found that two people cannot be engaged in the "same health profession" for purposes of MCL 600.2169 unless each has an identical license under the Public Health Code. The plaintiff in *Brown* filed a medical malpractice lawsuit and included with her complaint two affidavits of merit, one signed by a physical therapist and one signed by an occupational therapist. Defendants answered and filed an affidavit of meritorious defense signed by a physical therapist. The trial court granted a default in favor of the plaintiff on the ground that defendants' affidavit of meritorious defense was insufficient because it was not signed by an occupational therapist. The Court of Appeals concluded that registered occupational therapists and licensed physical therapists are engaged in the "same vocation, calling, occupation or employment," and therefore stated that it would conclude that physical therapists and occupational therapists were engaged in the "same health profession" for purposes of MCL 600.2169(1)(b). However, the Court noted that under *McElhaney*, *supra* two people must have identical licenses under the Public Health Code in order to be engaged in the same health profession for purposes of MCL 600.2169, a holding that the *Brown* Court described as

unreasonable. Accordingly, the Court reluctantly held that for purposes of satisfying MCL 600.2169(1)(b), physical therapists and occupational therapists were not engaged in the “same health profession.”

CHAPTER 2

Evidence

Part IV—Hearsay (MRE Article VIII)

2.40 Hearsay Exceptions

K. Statements Narrating, Describing, or Explaining the Infliction or Threat of Physical Injury

Effective March 24, 2006, and applicable to trials and evidentiary hearings started or in progress on or after May 1, 2006, a declarant's statements are admissible under specific circumstances in criminal cases involving domestic violence. 2006 PA 79. At the bottom of page 113, immediately before Section 2.41, add a new subsection as indicated above and insert the following text:

MCL 768.27c establishes a new exception to the hearsay rule for statements purporting to narrate, describe, or explain the infliction or threat of physical injury upon the declarant. This exception applies only to offenses involving domestic violence. A declarant's statement may be admitted under MCL 768.27c if all of the following circumstances exist:

“(a) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.

“(b) The action in which the evidence is offered under this section is an offense involving domestic violence.

“(c) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of a statement made more than 5 years before the filing of the current action or proceeding is inadmissible under this section.

“(d) The statement was made under circumstances that would indicate the statement's trustworthiness.

“(e) The statement was made to a law enforcement officer.” MCL 768.27c(1).

For purposes of subsection (1)(d) of MCL 768.27c, “circumstances relevant to the issue of trustworthiness include, but are not limited to, all of the following:

(a) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.

(b) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.

(c) Whether the statement is corroborated by evidence other than statements that are admissible only under this section.” MCL 768.27c(2).

For purposes of MCL 768.27c, the phrase “offense involving domestic violence” means “an occurrence of 1 or more of the following acts by a person that is not an act of self-defense:

(i) Causing or attempting to cause physical or mental harm to a family or household member.*

(ii) Placing a family or household member in fear of physical or mental harm.

(iii) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

(iv) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.” MCL 768.27c(5)(b).

*“Family or household member” is defined in MCL 768.27c(5)(c).

MCL 768.27c also contains a notice requirement. MCL 768.27c(3) requires the prosecuting attorney to disclose evidence admissible under the statute, “including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown.”

CHAPTER 3

Civil Proceedings

Part V—Trial (MCR Subchapter 2.500)

3.48 Jury Deliberation

A. Materials in Jury Room

By order issued April 7, 2006, the Michigan Supreme Court reversed the Court of Appeals' judgment in *Mays v Schell*, 268 Mich App 432 (2005). *Mays v Schell*, 474 Mich 1109 (2006). Accordingly, delete the November 2005 update to page 231.

CHAPTER 3

Civil Proceedings

Part VII—Rules Governing Particular Types of Actions (Including MCR Subchapters 3.300– 3.600)

3.60 Arbitration

D. Judicial Review and Enforcement

Effective May 1, 2006, MCR 3.602(I)–(N) were eliminated. Near the bottom of page 251, delete the last three sentences of the third paragraph in this subsection and delete the last paragraph of page 251 entirely.

CHAPTER 3

Civil Proceedings

Part VII—Rules Governing Particular Types of Actions (Including MCR Subchapters 3.300– 3.600)

3.60 Arbitration

E. Timing

Effective May 1, 2006, MCR 3.602(I)–(N) were eliminated. In the middle of page 252, delete the reference to MCR 3.602(I) at the end of the first paragraph and delete the second paragraph in its entirety.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.25 Search Warrants

C. Affidavit

Insert the following text before the second-to-last paragraph near the bottom of page 358:

A tip received by Crime Stoppers and forwarded to law enforcement must adhere to the standard requirements for search warrants based on information from an unnamed informant. *People v Keller*, ___ Mich App ___, ___ (2006). Where police were unable to establish the anonymous informant's credibility and where information gathered from surveillance and a trash pull did not show that the information from the tipster was reliable, the affidavit was insufficient to establish probable cause and a search warrant should not have been issued. *Keller, supra* at ___.

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.48 Jury Instructions

D. Standard of Review

Insert the following text immediately before Section 4.49 on page 435:

Failure to instruct the jury on the defense of accident is not subject to automatic reversal. *People v Hawthorne*, ___ Mich ___, ___ (2006). When a trial judge refuses a defendant's request to deliver an instruction on the defense of accident, a verdict is reversible if the defendant "establishe[s] that the alleged error undermined the reliability of the verdict." *Hawthorne, supra* at ____.

4.49 Jury Deliberation

A. Materials in Jury Room

Delete the November 2005 update to page 435. In an order dated April 7, 2006, the Supreme Court reversed the Court of Appeals' judgment and reinstated the trial court's order granting a new trial. *Mays v Schell*, 474 Mich 1109 (2006).

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.59 Sentencing—Jail Credit

C. Arrested Parolees

Insert the following text after the partial paragraph at the top of page 466:

See also *People v Stead*, ___ Mich App ___, ___ (2006). A defendant who spends time in jail for an offense committed while the defendant was on parole is a parole detainee for whom bond is not considered. A parole detainee is entitled to credit against the sentence from which he or she was paroled for any time spent in jail awaiting disposition of the new offense.

E. Consecutive Sentences

Insert the following text after the existing paragraph on page 466:

A term of imprisonment for conviction of an offense committed by a defendant while on parole begins after expiration of the original sentence. *People v Stead*, ___ Mich App ___, ___ (2006). Any time the defendant spent in jail awaiting disposition of the later offense is creditable only toward the sentence from which he or she was paroled. *Stead, supra* at ___.